Supreme Court, U.S.
FILED
MAY 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1594

In The

Supreme Court of the United States

October Term, 1988

DEBRA J. WINROD, ET AL.

Petitioners,

v.

FORD MOTOR COMPANY, ET AL.

Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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STATEMENT OF THE CASE

Petitioners filed this action in Franklin County, Court of Common Pleas on February 24, 1986. Petitioners alleged *inter alia* that Respondent Ford Motor Company failed to satisfy its duties under an express warranty given in connection with the purchase of a 1985 Ford Escort, and, thus, was in violation of the *Magnuson-Moss Warranty Act* 15 U.S.C. §2301, *et seq.* Petitioners purchased the automobile for $7,367.37 and financed the deal with a promissory note in the amount of $10,080.18.

The court found for the Petitioners and granted rescission of the Purchase Contract and cancellation of the Promissory Note and Agreement. The court further

ordered Petitioners to pay Respondent $1,175.00 for usage of the automobile against which was set-off the Petitioner's down payment of $517.37.

Thereafter, Petitioners filed a petition for costs and expenses in the amount of $24,665.14 of which $20,923.74 was claimed as attorneys' fees. The trial court awarded Petitioners $3,800.00.

Petitioners appealed the award to the Tenth District Court of Appeals, Franklin County, Ohio. In a decision rendered on September 29, 1988, the court of appeals held that the trial court was within its discretion to award Petitioners $3,800.00 as reasonable expenses.

Petitioners appealed the decision to the Ohio Supreme Court on a Motion to Certify the Record. Petitioners' motion was overruled without opinion.

REASONS FOR DENYING THE WRIT

A. THE TRIAL COURT'S DETERMINATION THAT $3,800.00 CONSTITUTED REASONABLE ATTORNEYS' FEES IN THIS CASE WAS WELL WITHIN THE DISCRETION GRANTED TO IT BY THE MAGNUSON-MOSS FEDERAL WARRANTY ACT.

The case below was relatively simple in nature; Petitioners claimed that the automobile that they purchased was defective and sought to have their Purchase Contract rescinded. The trial court determined that the contract should be rescinded and ordered Petitioners to pay $1,175.00 for their reasonable use of the automobile. No novel legal or factual questions arose during the course of the litigation. The parties did not conduct particularly

extensive discovery, nor were there any lengthy depositions. Furthermore, the trial court did not find that Respondent acted in bad faith and rejected Petitioners' contention that Respondent engaged in deceptive consumer practices in violation of The Ohio Consumer Sales Practices Act §1345.01, *et seq.* of the Ohio Revised Code.

For these reasons, Petitioners' request for nearly twenty-five thousand dollars in attorneys' fees is outrageous. In the itemized account provided with their request for expenses, Petitioners' counsel claim to have spent 146.40 hours of attorney time preparing for and litigating what was by any standard an extremely simple case. Petitioners' counsel further claim that their secretaries and legal assistants spent approximately 116 hours preparing materials for the trial and pretrial litigation of this case. Given that this case did not generate an inordinate amount of paper-work, it is difficult to imagine how so many hours could have been incurred. To place the amount for expenses claimed by Petitioners in proper perspective, one only need note that the automobile in question cost $7,367.37, and no monetary damages were awarded Petitioners as a result of their claims.

The trial court properly concluded that Petitioners' request for nearly $25,000 in attorneys' fees and expenses was entirely *unreasonable* given the nature of the case.

In reviewing the decision of the trial court, the Franklin County Court of Appeals held that the trial court was within its discretion to determine that Petitioners could not have reasonably incurred $25,000 in fees and expenses in litigating their claims.

In so holding the court stated that;

> "Several factors should be taken into account to determine the reasonableness of attorneys and one important factor is the result achieved at trial.
>
> * * *
>
> In the present case, there was no monetary award in the plaintiff's (sic) principal cause of action. The trial court granted rescission of the purchase contract for a $7,367.37 automobile and cancellation of the underlying promissory note of $10,080.18. In addition, the trial court required the plaintiffs to pay the defendants $1,775.00 to offset their use of the automobile. The verdict rendered by the trial court with respect to plaintiff's (sic) warranty action cannot be interpreted to allow for reasonable attorneys' fees in excess of $23,000.00 as requested by plaintiff."
>
> Appendix at A-19, A-20.

Thus, the decision of the court of appeals to affirm the award of the trial court was neither arbitrary nor unreasonable. Rather, the decision was soundly based on the facts of the case.

Petitioners contend that the trial court did not have the authority to reduce their fee request because under the Magnuson-Moss Warranty Act of 1975, 15 U.S.C. §2301, *et seq.*, fees awarded to prevailing parties must be based on actual time expended on the litigation. A cursory reading of the statute reveals that Petitioners' contentions are utterly without merit.

Section 2310(d)(2) of the Magnuson-Moss Act governs the award of attorneys' fees. The section provides in pertinent part that:

> "If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he *may* be

> allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses *(including attorneys' fees based on actual time expended)* determined by the court to have been *reasonably incurred* by the plaintiff for or in connection with the commencement and prosecution of such action, *unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.*" (Emphasis added.)

The language of this provision clearly indicates that an award of attorneys' fees under the Act is entirely within the discretion of the trial court. It is equally clear that in certain circumstances, even where the consumer prevails, the court has the power to decide that no attorneys' fees should be awarded. Nowhere does the provision grant the court power to award *unreasonable* attorneys' fees as a punitive measure against the losing party.

As the court of appeals pointed out in its decision, the legislative intent underlying §2310(d)(2) was to make it feasible for consumers to bring claims under Magnuson-Moss into court. In the Senate Committee Report, 93rd Congress, Report No. 93-151, page 7, the drafters of the Act stated that;

> "***(T)here is a need to insure warrantor performance by monetarily penalizing the warrantor for nonperformance – and awarding that penalty to the consumer as compensation for his loss. One way to effectively meet this need is by providing for *reasonable attorneys' fees and court costs* to successful consumer litigants, thus making consumer resort to the courts feasible. It is hoped that by making court actions feasible, suppliers will be encouraged to develop workable informal dispute settlement procedures for the expeditious settlement of consumer complaints." (Emphasis added.)

Although the award of attorneys' fees under the Act does function as a type of monetary penalty, its central purpose is to facilitate private consumer litigation under the

Act and to encourage the development of informal dispute settlement mechanisms. For this reason, the award must be limited to reasonable attorneys fees. The Act does not, as Petitioners apparently believe, provide a windfall to any attorney fortunate enough to procure a valid claim.

Petitioners argue that an award of attorneys' fees under §2310(d)(2) must be based upon the actual hours expended on the case multiplied by a reasonable hourly rate. As the court of appeals noted, however, the Act provides that those hours must have been reasonably incurred. In awarding attorneys' fees neither the trial court, nor the reviewing court are required to adhere slavishly to the amount requested by a prevailing party, merely because there exists documentation of the hours expended.

Other courts which have addressed the questions raised by §2310(d)(2) are in complete accord with the Franklin County Court of Appeals on this issue. See, e.g., *General Motors Acceptance Corporation v. Jankowitz*, 553 A.2d 1380 (N.J. Super. Ct. App. 1989); *Drouin v. Fleetwood Enterprises*, 209 Cal. Rptr. 623 (Cal. Ct. App. 1985).

In *Jankowitz, supra*, the court held that although a fee award under Magnuson-Moss may exceed the amount of recovery obtained at trial, the trial court has the discretion to determine that certain fees have not been reasonably incurred. The court stated that in making that determination the fact finder should consider the following factors: (1) the nature of the services rendered; (2) the amount of time actually expended; (3) the amounts involved; (4) the results obtained; and (5) the novelty or

difficulty of the issues involved in the case. *GMAC v. Jankowitz*, 553 A.2d at 1384.

In this case, the Franklin County Court of Appeals, after considering all of the relevant factors, determined that Petitioners' counsel could not have reasonably expended 46 hours in litigating what was essentially a very straightforward, even simplistic case. The court did not, as Petitioners suggest, rely upon the holding in *Hanks v. Pandolfo*, 447, 450 A.2d 1167 (Conn. Sup. Ct. 1982), for the proposition that the amount of recovery serves as a cap on the amount of attorneys' fees that can be awarded. Rather, the court determined that the amount of recovery should be considered, along with other factors, in assessing the amount of attorneys' fees that should be awarded in a given case.

This reasoning is well supported by the relevant statutory language and in complete accord with the approach adopted by other jurisdictions. Accordingly, there is no need for this Court to review the decision of the Franklin County Court of Appeals, and Petitioners' request for certiorari should be summarily denied.

B. THE DECISION OF THE FRANKLIN COUNTY COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

This Court has never addressed the issue of what constitutes "reasonable" attorneys' fees under the Magnuson-Moss Warranty Act, 15 U.S.C. §2301 *et seq.* The two decisions upon which Petitioners rely, *City of Riverside v. Santos Rivera*, 477 U.S. 561 (1986) and *Hensley v. Eckerhart*, 461 U.S. 124 (1983), deal exclusively with fee awards

pursuant to the Civil Rights Attorneys' Fees Act, 42 U.S.C. § 1988. For this reason, Petitioners' contention that the decision of the Franklin County Court of Appeals is in conflict with the principles established by this Court in *Riverside* and *Hensley* is utterly without merit. However, even a cursory reading of its decision rendered by the Franklin County Court of Appeals reveals that the decision is not in conflict with this Court's decisions in *City of Riverside* and *Hensley*.

Petitioners contend that the Franklin Court of Appeals utilized a "proportionality" approach in affirming the trial court's reduction of their fee request. More specifically, Petitioners argue that the court of appeals determined that an award of attorneys' fees must necessarily be proportionate to the amount of monetary damages recovered at trial. These arguments completely mischaracterize the court's decision.

The court of appeals did not hold that a fee award under Magnuson-Moss must be proportionate to the money damages awarded in the case. Rather, the court determined that the result obtained at trial is one of the factors to be considered in establishing a reasonable fee award. This determination is in complete accord with the guiding principles set forth in *Hensley* and *City of Riverside*.

In *Hensley*, this Court expressly approved the "lodestar" approach as being the best means of determining appropriate awards of attorneys' fees under the Civil Rights Attorneys Fees Act.

> The most useful starting point for determining the amount of a reasonable fee is the number of hours

> reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claims. Where the documentation of hours is inadequate, the district court may reduce the award accordingly. *The district court also should exclude from this initial fee calculation hours that were not "reasonably expended."* S Rep No. 93-1011, p 6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." (Emphasis Added).
>
> 461 U.S. at 433, 434.

Essentially, the "lodestar" approach requires a trial court to begin any determination of fee awards by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Once this value is obtained, several factors should be considered in determining whether the amount must be reduced or enhanced. One important factor that may require the court to adjust the figure upward or downward is the results obtained at trial. *Hensley*, 461 U.S. at 434.

The lodestar test requires a court to engage in a two-tiered analysis of the amount requested. First, the court

must determine if the hours documented by the prevailing party were reasonably billed. In order to be "reasonably" billed, the documentation of hours must reflect sound billing judgment. Those hours which were not reasonably billed should be excluded from the amount requested. *Id.* The remaining value should then be adjusted to account for the difficulty or novelty of the legal issues involved in the case, and for the results obtained at trial. *Id.*

Pace Petitioners' arguments to the contrary, nowhere in *Hensley* is there support for the proposition that an award of attorneys' fees must be based solely on the actual time expended. Rather, this Court has repeatedly affirmed its commitment to the principle that in order to recover for the hours spent on a case there must be a demonstration that the time was reasonably incurred. *City of Riverside v. Santos Rivera*, 477 U.S. at 569.

In this case, the Franklin County Court of Appeals acknowledged implicitly that the time submitted by Petitioners did not reflect sound billing judgment. As the court noted, no reasonable attorney would bill his client $23,000 for a case that was worth at most $10,000 (the amount of the Promissory Note). Clearly, then, the reasoning adopted by the court in this case closely resembles the lodestar approached articulated in *Hensley* and *City of Riverside*. For this reason, Petitioners' argument that the decision of the Franklin County Court of Appeals is in conflict with this Court is without merit. Accordingly, Petitioners' request for certiorari should be denied.

CONCLUSION

Petitioner has failed to show any conflict between the decision of the Franklin County Court of Appeals and prior decisions of this Court. Petitioner has also failed to demonstrate any other basis for this Court to hear this case. Accordingly, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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